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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

B. F. DIAMOND CONSTRUCTION COMPANY, INC.
and
AETNA CASUALTY & SURETY COMPANY,
Petitioners,

-v.-

HOWARD LEMELLE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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Questions Presented

1. Is a construction worker employed in building a bridge over navigable water, who performed no functions associated with longshore, shipbuilding or harbor work, involved in "maritime employment" within the meaning of the Longshoremen and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 902(3)?

2. Are the questions of fact determined by the Administrative Law Judge (ALJ) and the Benefits Review Board subject to independent review by the Courts of Appeals without a ruling of no substantial evidence to support the determination of the Administrative Courts?

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 25, 1982.

Opinion Below

The opinion of the Court of Appeals for the Fourth Circuit in the captioned matter is reported at 674 F.2d 296, (1982), 14 BRBS 609, and is reprinted as Appendix A hereto, *infra*, p. A-1.

The opinion of the Benefits Review Board (United States Department of Labor) is reported at 13 BRBS 542 and is reprinted as Appendix B hereto, *infra*, p. B-1. The opinion of the Administrative Law Judge is reprinted as Appendix C hereto, *infra*, p. C-1.

Jurisdiction

The opinion of the Court of Appeals for the Fourth Circuit was entered on March 25, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statutory Provisions Involved

United States Code, Title 28:

> § 920(3): The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> §921(c): Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United

States Code [28 USCS § 2112]. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

Statement of the Case

Claimant LeMelle, employed by B. F. Diamond Construction Co., Inc., was working as a concrete finisher on the construction of the new James River Bridge at Newport News, Virginia. LeMelle's sole duties at the time of his injury on November 23, 1977 involved pouring and vibrating concrete on a highway bridge pier approximately one mile from shore. LeMelle was working inside a form that was used to shape and hold concrete for a stem of the pier. The stem was attached to a concrete footer, and the footer to a piling that had been driven into the ground under the river.

LeMelle contended that he was an employee engaged in maritime activity, not by his occupation, but by the sheer fact that the bridge was being built in aid of navigation. The ALJ found that LeMelle was not engaged in maritime employment within the meaning of the LHWCA. He adopted the ALJ's inferences drawn from similar facts in *Broome* v. *B. F. Diamond*

Construction Co., Inc., 5 BRBS 59 (ALJ) (1976), a matter involving another of petitioner's bridge workers. In *Broome*, the ALJ found that the bridgeworker was not a worker in either the longshoring or shipbuilding industries. It also found that the bridge was not an aid to maritime traffic. The Benefits Review Board affirmed the ALJ's decision, specifically finding that the bridge was not an aid to navigation and that LeMelle's work, not having "a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters," was not maritime employment within the meaning of § 902(3). (B-4, 11).

The Court of Appeals reversed. The single connection that the court below found that the claimant had with maritime activity was the "fact," arrived at through its *own* determination, that the bridge on which claimant was working was in aid of navigation (merely because the new bridge provided more clearance than the bridge it was replacing) (A-4-5). It reversed the findings of the ALJ and the Benefits Review Board that the bridge was not in aid of navigation. This single connection was all that the court below considered in concluding that LeMelle had a "realistically significant relationship to maritime activities." In reaching its determination, the court below did not make any ruling that the findings of the ALJ or Benefits Review Board were not supported by substantial evidence.

Reasons for Granting the Writ

1. By discarding the Caputo/Ford two-pronged occupational test, Fourth Circuit, contrary to Congressional intent, categorically extends LHWCA coverage to virtually all bridge construction workers

The decision below establishes a new dimension to coverage under the Longshoremen and Harbor Workers Compensation Act (LHWCA) by examining exclusively the nature of the facility on which claimant was working, rather than the nature of claimant's occupation. No finding was made as to whether claimant was *performing* any activities that were related to longshoring, harbor work or shipbuilding.

The Fourth Circuit has set an anomalous and dangerous precedent. No other Court has held a bridge worker not engaged in longshoring, harbor working or shipbuilding activities to be covered. Under the Fourth Circuit's rationale, all workers even remotely involved in an "aid to navigation," and virtually all bridge workers, would be covered, including, *inter alios*, delivery truck drivers and safety inspectors, whose work, like LeMelle's, could not meaningfully be called "maritime employment."

Section 902(3) of the Act defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such person does not include a master or member of a crew of any vessel. . . ." The Fourth Circuit has disregarded the parameters of "maritime employment" as established by the Supreme Court in its review of this provision of the Act and its legislative history.

In *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 U.S. 249 (1977), the Court concluded that the Act was amended in 1972 to provide coverage to workers in *occupations* which Congress intended to reach, who might otherwise, because of technological improvements, be covered for only part of their activity. In *P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69, 79 (1979), the Court again stressed the *nature of the employment*, and noted that Congress did "not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel" (*quoting* H.R. Rep. No. 92-1441).

In *Ford*, the Court concluded that the Act focused on the nature, not location, of employment. The Act, it observed, "does not extend coverage to all workers in the situs area. . . ." As an example, the Court said, "neither the driver of the truck carrying cotton . . . nor the locomotive engineer . . . was engaged in maritime employment *even though he was working on the maritime situs*." 444 U.S. at 83 (emphasis supplied)

The Fourth Circuit has significantly and unjustifiably departed from the *Caputo* and *Ford* rule. Discarding the "occupation" test and unmindful of the purposes of the LHWCA, the

Court of Appeals below held that a worker "working over navigable waters on a bridge designed in part as an aid to navigation is engaged in maritime employment." (A-9) This shift in focus from the "nature of the employment[1] to the situs' relationship to navigation thwarts the purposes of the 1972 Amendments as found by this Court. Since most projects within any maritime situs can be called "aids to navigation," the lower court decision, if allowed to stand, will mark the effective return to the pre-1972 rule of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). Extending LHWCA coverage to bridge workers covered by State compensation would not remedy the mischief which Congress sought to reach or further the purposes of the Act, and so violates a basic precept of statutory interpretation. *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1 (1904); *Heydon's Case*, 76 Eng. Rep. 637 (1584); *see also S. Rep.* No. 973 (69th Cong.), *quoted in Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 121 (1962) (ftn. 10), ("the purpose of the bill is to provide for a class of employees commonly known as 'longshoremen' ").

2. *The test invoked by the court below conflicts with the decisions of other Courts of Appeals*

The Fourth Circuit's decision is in direct conflict with other Courts of Appeals decisions and adds to the general confusion surrounding the issue at bar.

The First Circuit, in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1976), *cert. denied*, 433 U.S. 908 (1977), looks at "the nature of [the workers'] regularly assigned duties as a whole." 539 F.2d at 275. That test is in line with *Caputo/Ford*. The Second Circuit demands that work have a "realistically significant relationship to maritime activities involving navigation and commerce on navigable waters" and prohibits any test based upon locus alone. *Fusco* v. *Perini North River Assoc.*, 622 F.2d 1111 (1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 959 (1981); *accord, Churchill* v. *Perini North River Associates*, 652 F.2d 255 1980, *cert. granted*, ___ U.S. ___, 102 S.Ct. 1425 (1982). Although the Fourth Circuit evidently applied the

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[1] The hearing before the ALJ established that a respondent was not involved in any longshore or harbor work within the meaning of § 2(3). (C-4).

Fusco test, it omitted the Second Circuit's incorporation of the *Caputo* and *Ford* holdings—the reference in the definition to longshoremen and harbor workers—as well as *Fusco*'s focus on the occupation of the employee rather than the locus of the project.

The Third Circuit applies yet another test and limits the scope of maritime employment to work which is "an integral part of . . . ship construction activities," *Dravo Corporation* v. *Maxin*, 545 F.2d 374, 380 (1978), *cert. denied*, 433 U.S. 908 (1977), or a "necessary ingredient" therein, *Dravo Corp.* v. *Banks*, 567 F.2d 593, 596 (1977), and excludes work not intimately connected to longshore or harbor activities. The instant respondent would clearly fail this test.

The Fifth Circuit similarly defines maritime employment as employment "directly involved" with "the work of loading, unloading, repairing, building," *Hullinghurst Industries* v. *Carroll*, 650 F.2d 750 (1980), *cert. denied* — U.S. —, 102 S.Ct. 1037 (1982), applying this test to the maritime nature of the employment as a whole or the claimant's activity at the moment of injury. *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir., 1978), *cert. denied* 441 U.S. 909 (1978). In *Gilliam* v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., 1981) a bridge construction worker was allowed recovery only because he was "engaged in longshoring activities at the time he was injured. 659 F.2d at 58. In *Browning* v. *B. F. Diamond Const. Co.*, — F.2d — (11th Cir., 1982) the Eleventh Circuit similarly held a bridge worker covered, but only after it found that the claimant was "involved in longshoring activities" at the time of his injury. In the instant case, the record makes clear that LeMelle had never been involved in such activities. Respondent would have been denied compensation in the Fifth and Eleventh Circuits.

The Ninth Circuit in *Weyerhauser* v. *Gilmore*, 528 F.2d 957, 960 (1976), *cert. denied* 429 U.S. 868 (1976), held that for an employee to be eligible "his *own* work, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable

waters.' " 528 F.2d at 961 (emphasis supplied) There the court cited from the Act's legislative history in which the Senate Committee on Labor and Public Welfare said:

> "[T]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Id. at 960. The Ninth Circuit, too, would have barred LeMelle from recovery.

These conflicts, in themselves, justify the grant of certiorari to reverse the judgment below.

3. *The court below exceeded Congress' delegation of adjudicatory authority by failing to apply the substantial evidence test to findings of fact made by the administrative courts*

Under the terms of the Act, 33 U.S.C. sec. 921(b)(3), findings of fact by the ALJ are conclusive if supported by substantial evidence, as is the ALJ's selection of reasonable conflicting inferences from those facts. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *see also Hullinghorst Industries* v. *Carroll*, 650 F.2d 750.

The Benefits Review Board made a finding of fact[2] that the James River Bridge was not an aid to navigation, (B-7-8), concluded that respondent was not engaged in maritime employment under the test in *Sedmak* v. *Perini North River Associates*, 9 BRBS 378 (1978), *aff'd sub nom.*, *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2d Cir., 1980), and affirmed the decision of the ALJ (had the Board found that the bridge was an aid, it presumably would have decided differently. *See* B-1 *et seq.* (Kalaris, J., concurring Miller, J. dissenting)).

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[2] The Benefits Review Board is empowered to make its own finding of fact in limited circumstances, so long as they do not contradict the findings of the ALJ. *Prolerized New England Company* v. *Benefit Review Board*, 637 F.2d 30 (1st Cir. 1980).

In the case at bar, the Fourth Circuit, like the Board, applying a single-dimensioned test, made its *own* finding that the bridge was an aid to navigation[3] and that respondent therefore met the *Sedmak* test. The Court of Appeals, however, did *not* hold that there was no substantial evidence for the ALJ's decision. Therefore, it was not empowered to make such a finding and to reverse on that basis.

Section 21(b)(3) of the LHWCA mandates that findings of fact of the ALJ shall be conclusive in review by the Board "if supported by substantial evidence." Section 21(c) subjects appellate courts to the same test. *See* H.R. Rep. No. 92-1441 (1972 amendments authorize "a judicial review of board decisions in the Courts of Appeals under the same 'substantial evidence' test"), *reprinted in* [1972] U.S. Code Cong. & Admin. News, 4698, 4709.

The Fourth Circuit did not apply the substantial evidence test, but merely did "not agree with [the Board's] rationale." (A-7). In so acting, the Fourth Circuit exceeded the adjudicatory authority extended to it by Congress. *See Crowell* v. *Benson*, 285 U.S. 22, 49-50 (1931).

(b) The ALJ and the Board both found that respondent was not an employee engaged in maritime employment within the meaning of the statute. The Court below refused to accept this determination. The finding should be considered a finding of fact and subject to the substantial evidence test under *South Chicago Co.* v. *Bassett*, 309 U.S. 251 (1939). In that decision, the Court held that whether a worker was a "master or member of a crew of any vessel" (and, therefore, excluded from coverage within the meaning of § 3(a)(1) of the LHWCA,) was a question of fact. The Supreme Court ruled that the lower court's finding, "if there was evidence to support it, was conclusive." The duty of the reviewing Court, Chief Justice Hughes noted, was simply to ascertain whether it was so supported. The Court wrote that "[t]he word 'crew' does not have any absolutely unvarying legal

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[3] To demonstrate the absurdity of this kind of single-dimensioned test, the Court below would apparently have ruled the other way had the new bridge been even one inch lower than the old bridge.

significance." 309 U.S. at 258-59. Similarly, the term "employee engaged in maritime employment" demands factual solution on a case-by-case basis.

The Appellate court cannot substitute its own finding even if it does not agree with the fact-finder's estimate. Thus, in *SEC* v. *Chenery*, 318 U.S. 80, 94 (1943), this Court held:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so."

Accord, Ramos v. *Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981).

When the question is "one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially," this Court has said, "the reviewing court's function is limited." *NLRB* v. *Hearst Publications*, 322 U.S. 111, 126 (1943); *see also Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977) (whether worker is "agricultural laborer" within the meaning of the NLRA is queston of fact and appropriate weight must be given the NLRB's determination).

(c) By abandoning the substantial evidence test, the Fourth Circuit has created a conflict in circuits on this fundamental principal governing appellate review of administrative findings of fact. The decision below conflicts with the ruling of other circuits which have adhered to this Congressionally-mandated principle in reviewing LHWCA administrative decisions. *Prolerized New England Company* v. *Benefit Review Board*, 637 F.2d 30 (1st Cir. 1980); *Garvey Grain Co.* v. *Cuellar*, 12 BRBS 821 (7th Cir. 1981); *Nelson Co.* v. *United States*, 639 F.2d 469 (9th Cir. 1980).

(d) The question of maritime employment is not jurisdictional, and is, therefore, governed by the standard established in *Crowell* v. *Benson*, i.e., subject to the substantial evidence test

and not subject to *de novo* review. Thus, in *Ramos* v. *Universal Dredging*, 653 F.2d 1353, *rev'g* 10 BRBS 368 (1979), the Court of Appeals ruled that "an injury may have a sufficient connection with traditional maritime activity to be well within the reach of admiralty jurisdiction, but not an injury covered by [§ 902(3)]" *Id.* at 1358-59 (citing with approval *Weyerhauser* v. *Gilmore*, 528 F.2d 951 (case of worker in sawmill log pond within maritime jurisdiction, but not within coverage of Act)). In the instant case, the question of coverage was improperly referred to by the Board, and treated by the Fourth Circuit, as jurisdictional. (B-6, n.2); *See also Crowell*, 285 U.S. at 54-55 (jurisdictional requirements for LHWCA purposes are that "the injury occur upon the navigable waters of the U.S. and that the relation of master and servant exist). Even if the issue is "jurisdictional," the invocation of special standards of review for "jurisdictional questions" has fallen into increasing disfavor. *See O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. at 507-08; *Morrison-Knudsen Co.* v. *O'Leary*, 288 F.2d 542 (9th Cir. 1961) (holding question of § 2(3) maritime employment subject to substantial evidence test, citing *South Chicago Co.*).

4. The decision below raises significant and recurring problems concerning the reach of the LHWCA, the meaning of "maritime employment", and the proper scope of judicial review

Recent decisions of the various Courts of Appeals present widely divergent interpretations of maritime employment. The decision below, however, if followed, however, poses the greatest threat to the rulings of the Supreme Court and to implementation of legislative intent, as it effectively abrogates the status requirement established by Congress in 1972. First, the decision below completely avoids any consideration of the occupation of the employee and implements a one-pronged examination of the work-site's effect on navigation. Second, it discards at the same time any analysis of whether the claimant is performing traditional longshoring, shipbuilding, or harborworking activities. Finally, it does away with the Congressionally-mandated method of review that makes the findings of the administrative court conclusive if supported by substantial evidence.

The Benefits Review Board was created to promote judicial efficiency by administrative determination of questions of fact. The refusal of the courts to see the issue of maritime employment as one of fact thwarts the legislative purpose in establishing the Board, *see Crowell*, 285 U.S. at 56-57, and results in their unconstitutionally exceeding the power granted to them by Congress through the LHWCA.

Because of the industry-wide implications of the holding below, the repercussions are of national and pressing significance. In its most recent investigation, the United States Department of Commerce, Bureau of the Census, found that gross business receipts in the Bridge, Tunnel and Elevated Highway Construction Contractors industry amount to $2.3 billion, with net construction receipts of about $1.8 billion. 72% of all construction receipts are for bridges and elevated highways. The Comptroller General, in his Report to the Senate, warned that "the United States has more than 500,000 bridges and slightly more than 200,000—or almost 4 out of every 10 bridges—are deficient" (GAO Report B-201433, April 11, 1981), meaning that the future impact of the decision below will be material.

Clearly, extending LHWCA coverage to workers in a separate industry not contemplated by Congress for coverage will have severe effects on the national economy, especially since recovery allowed from employers by the LHWCA is significantly higher than that allowed by state compensation laws, under which the bridge construction industry has traditionally operated.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,
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